

Before the
Administrative Hearing Commission
State of Missouri



PARKS AUTO SALES,)	
)	
Petitioner,)	
)	
vs.)	No. 14-0389 RL
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

DECISION

Parks Auto Sales (“Parks”) is not entitled to licensure as a motor vehicle dealer.

Procedure

Parks filed its complaint on March 27, 2014, seeking this Commission’s redetermination of the Director of Revenue’s (“the Director”) final decision denying its application for a motor vehicle dealer license. Parks also filed a motion for expedited hearing on that date and, as a result, we scheduled a hearing for April 9, 2014. The Director filed an answer and a motion to dismiss for lack of subject matter jurisdiction on April 1, 2014. Parks responded to the motion on April 7, 2014. On April 7, 2014, we denied the Director’s motion.

We held a prehearing conference with the parties on April 8, 2014, during which the Director verbally requested a continuance. We granted the continuance. On April 18, 2014, the Director filed a renewed motion to dismiss, and Parks filed suggestions in opposition to the

renewed motion on April 30, 2014. We denied the motion on May 1, 2014 and convened a hearing on May 20, 2014. Parks appeared through one of its principals, Kenneth Bialczac, and counsel David F. Barrett. Joseph Cox and Jonathan Hale represented the Director. The matter became ready for our decision on July 8, 2014, the date the last written argument was filed.

Findings of Fact

1. Parks was licensed as a motor vehicle dealer for a number of years.
2. Parks is owned and operated by two brothers, Kenneth and William Bialczac. They are each 50% shareholders of the business.
3. In addition to automobile dealing, the brothers are engaged in the businesses of towing and parking motor vehicles. The businesses have large amounts of cash receipts.
4. In 2006 and 2007, Kenneth and William Bialczac filed false federal tax returns in which they significantly understated their true income.
5. On September 16, 2010, Kenneth and William Bialczac each pled guilty to two counts of attempting to evade taxes in violation of 26 U.S.C. § 7201 in 2006 and 2007.
6. The brothers were each sentenced to one year and one day in prison and two years' conditional release and were ordered to make restitution to the Internal Revenue Service for taxes owed but not paid.
7. The United States District Judge allowed the brothers to serve their prison sentences serially so that one of them could run their business operations while the other served his time.
8. Both brothers have completed their prison sentences. Kenneth Bialczac has completed his probation. William Bialczac is still on probation.
9. On August 27, 2013, Parks applied for renewal of its dealer license for the year 2014.

10. Block 13 of the application form contains a certification that states: “I CERTIFY THAT I HAVE PHYSICALLY INSPECTED THE ABOVE LOCATION AND THAT THE APPLICANT’S BUSINESS QUALIFIES AS A BONA FIDE PLACE OF BUSINESS FOR MANUFACTURING SELLING OR AUCTIONING MOTOR VEHICLES POWERSPORTS TRAILERS AND/OR BOATS.” *Ex. A to Resp’s April 1, 2014 Motion to Dismiss.* This certification is required every other year.

11. The reverse side of the application form also contains instructions as to who must complete the block 13 certification. It states, in pertinent part:

An authorized law enforcement officer or designee MUST complete this section . . . If the business is located in a first class county (. . . St. Louis City . . .) an authorized city policeman who is employed in the same city the business is located [sic] may complete the inspection. Certifications may not be completed by a sheriff or marshal (References Sections 301 550 through 301 573 RSMo).

Id.

12. The Office of the Chief of Police of the Metropolitan Police Department of the City of St. Louis (“SLMPD”) issued a “Special Order” on October 28, 2010, that states in pertinent part:

Dealer Certification Inspections

- a. If an applicant for a Missouri auto dealership certification requests an inspection at an Area Station, the applicant will be directed to contact the Auto Theft Section located on the fourth floor of the Headquarters Building, 1200 Clark Avenue, between the hours of 9:00 A.M. and 4:00 P.M., Monday through Friday.
- b. The Auto Theft Section will have the sole responsibility to perform such certification inspections.

Id.

13. As part of Parks' renewal application, Lieutenant Michael J. Anderson¹ with the SLMPD signed the block 13 certification.

14. Anderson also signed the block 13 certification on Parks' renewal application in 2011. But in 2010 and 2012, the block 13 certification was signed by an officer who denoted the officer was with the Auto Theft section.

15. On September 25, 2013, the Director issued notice that the application was not being processed because it was not accompanied by a copy of Parks' garage policy and because it had not been certified by "St. Louis City Auto Theft."

16. Parks subsequently submitted the garage policy, but did not submit another certification. Parks' manager called the auto theft unit a number of times to ask one of its members to sign the block 13 certification, but none of its officers went to the business to perform the inspection.²

17. Parks' application is otherwise complete.

18. After a period of discussion between representatives of Parks and the Director, on March 27, 2014, Parks filed a complaint appealing the Director's failure to renew its license.

Conclusions of Law

I. Authority to Decide this Appeal/Motion to Dismiss

Section 301.562.1³ gives us authority to decide an appeal from the Director's decision to refuse to issue or renew any license required pursuant to §§ 301.550 to 301.573. A motor

¹ Joint Exhibit D, a memo dated April 7, 2014 from an employee of the Licensing Section of the Peace Officer Standards and Training Commission, indicates that Anderson holds a valid Class A Peace Officer License, but "is not currently commissioned." We infer that as of that date, Anderson was no longer employed by the SLMPD, but we have no reason to believe he was not so employed on August 27, 2013, when he signed the block 13 certification on Parks' renewal application.

² The record lacks competent evidence as to why an officer of the Auto Theft Section did not sign the block 13 certification on Parks' 2013 renewal application, although the Director's counsel stated it was his understanding that the appropriate detective refused to inspect and certify the business because of the brothers' criminal issues.

³ Statutory references are to RSMo Supp. 2013, unless otherwise noted.

vehicle dealer license falls into this category. Section 301.560. The Director has filed two motions to dismiss this case for lack of subject matter jurisdiction, and he renewed that motion at the hearing.

Section 301.560.1 provides, in pertinent part:

(1) Every application . . . shall include a certification that the applicant has a bona fide established place of business. Such application shall include an annual certification that the applicant has a bona fide established place of business for the first three years and only for every other year thereafter. The certification shall be performed by a uniformed member of the Missouri state highway patrol or authorized or designated employee stationed in the troop area in which the applicant's place of business is located; except that **in counties of the first classification, certification may be performed by an officer of a metropolitan police department when the applicant's established place of business of distributing or selling motor vehicles or trailers is in the metropolitan area where the certifying metropolitan police officer is employed.**

(Emphasis added). The Director agrees that Parks has met all requirements for issuance of a license except for the certification. Furthermore, the Director does not contend that Parks lacks a bona fide place of business. The Director simply argues that Parks has never submitted a complete application because the block 13 certification was not signed by a member of SLMPD's auto theft unit, and that we therefore lack jurisdiction to decide its complaint.

As a preliminary matter, we disagree that we lack subject matter jurisdiction.

"Subject-matter jurisdiction concerns 'the nature of the cause of action ...' and exists only when the tribunal 'has the right to proceed to determine the controversy or question in issue between the parties....'" *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. banc 1982) (quoting *Cantrell v. City of Caruthersville*, 359 Mo. 282, 221 S.W.2d 471, 476 (1949)). **It is a matter of the tribunal's "authority to render a judgment in a particular category of case."** *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009).

M.A.H. v. Missouri Dept. of Social Services, 2014 WL 4067208, 3 (Mo. App. E.D., 2014) (slip op.). To paraphrase the court in *Webb*, this Commission has the authority to render a decision in this type of case. We do not lack subject matter jurisdiction.

Whether we have the *authority* to hear this case at this time is a different matter. The Director has not, at this point, refused to issue a dealer license to Parks. But he refused to consider Parks' application on the grounds that Parks had not filed a complete application. Parks argues it has submitted an application that meets the necessary statutory requirements, and that the Director's refusal to process it amounts to a de facto denial from which it may appeal.

Whether the Director was justified in refusing to consider Parks' application is a close question. But when we review § 301.560.1(1) – the statute that is the crux of this issue – we think Parks has the better argument. The statute requires a certification only by “an officer of a metropolitan police department when the applicant's established place of business . . . is in the metropolitan area where the certifying metropolitan police officer is employed.” Parks submitted an application containing a certification that meets this requirement, and the Director has not acted on it.

The Director argues that it is not for this Commission to tell the SLMPD how it should run its operations and take care of its responsibilities, including determining which personnel shall be responsible for inspection of auto dealerships for licensing purposes. We agree. But the SLMPD's internal directive to its staff is not binding on Parks. It should be binding on the SLMPD's own personnel, of course, and if one of them has failed to comply with that directive, a problem clearly exists. But it is not Parks' problem. Likewise, while the Director is evidently cooperating with the SLMPD in insisting on certification in accordance with the SLMPD's internal rule, such cooperation should not bar Parks' application from consideration when it has met the requirements of § 301.560. The Director's attempt to vary those requirements and

compel Parks to abide by that variance is tantamount to his enforcement of an unpublished rule. *See Department of Soc. Servs. v. Little Hills Healthcare, LLC*, 236 S.W.3d 637, 642 (Mo. banc 2007), *citing NME Hosps., Inc. v. Department of Soc. Servs.*, 850 S.W. 2d 71, 74 (Mo. banc 1993) (Any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a “rule”); § 536.010(6) (a rule is an “agency statement of general applicability that implements, interprets, or prescribes law or policy[.]”).⁴

Parks applied for a license. Its application met the requirements of § 301.560.1, but the Director returned the application to Parks. We construe this failure to act on the license application as a denial. “An administrative agency's failure to act may constitute a decision denying a claim.” *Dore & Assoc. Contracting, Inc. v. Missouri Dep't of Labor & Indus. Relations*, 810 S.W.2d 72, 75–76 (Mo. App., W.D., 1990). In *Rees Oil Co. & Rees Petroleum Products, Inc. v. Director of Revenue* 992 S.W.2d 354 (Mo. App., W.D., 1999), Petitioners argued that they filed a refund claim in August 1995, but that the Director failed to act on it. The court held that “[t]he Director, by failing to act on Petitioner's refund claim, has effectively refused to consider and has denied the claim.” *Id.* at 358. Likewise in this case, the Director effectively denied Parks’ application by refusing to consider it.

We conclude that we have authority to consider Parks’ appeal. We deny the Director’s motion to dismiss.

II. Cause for Denial

Parks has the burden to prove it is entitled to a license. Section 621.120, RSMo. 2000. The Director’s answer affords notice to Parks of the grounds for denying its application. *Ballew*

⁴ Insofar as it purports to govern only the conduct of the SLMPD’s own personnel, the Special Order is not a “rule.” Section 536.010(6)(c) (an interagency directive is not a rule if it does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof).

v. *Ainsworth*, 670 S.W.2d 94, 103 (Mo. App. E.D. 1984). The answer cites § 301.562.1 and

.2(3), which provide:

1. The department [of revenue] **may** refuse to issue or renew any license required pursuant to sections 301.550 to 301.573 for any one of any combination of the causes stated in subsection 2 of this section. . . .

2. The department may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any license issued under sections 301.550 to 301.573 for any one or any combination of the following causes:

* * *

(3) The applicant or license holder has, within ten years prior to the date of the application, been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a prosecution under the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions, or duties of any business licensed under sections 301.550 to 301.573; for any offense, an essential element of which is fraud, dishonesty or an act of violence; or for any offense involving moral turpitude, whether or not sentence is imposed[.]

The Director's answer also cites 12 CSR 10-23.160, as discussed further below.

A. Criminal Conviction--§ 301.562(3)

Section 301.562.2(3) contains three separate clauses to describe the circumstances under which a conviction or guilty plea may be cause for denial:

- a) if the offense is “reasonably related to the qualifications, functions or duties” of the profession;
- b) if an essential element of the offense is fraud, dishonesty or an act of violence; and
- c) if the offense involves “moral turpitude.”

*Reasonably related to the qualifications,
functions, or duties of a dealer*

To “relate” is to show or establish a logical or causal connection. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 1916 (unabr. 1986). The qualifications of a dealer include good moral character. Section 301.559.3. Thus, if a criminal offense indicates a lack of good moral character, it is reasonably related to the qualifications of a motor vehicle dealer.

“Good moral character” is honesty, fairness, and respect for the rights of others and for the laws of the state and nation. *Hernandez v. State Bd. of Regis’n for the Healing Arts*, 936 S.W.2d 894, 899 n.1 (Mo. App., W.D. 1997). In considering this factor, we may impute the actions of Parks’ principals to the corporation itself. *See State Board of Accountancy v. Integrated Financial Solutions, L.L.C.*, 256 S.W.3d 48, 53-54 (Mo banc 2008). The Bialczac brothers pled guilty to 26 U.S.C. § 7201, which provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction therefore, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Willful evasion of the obligation to pay income tax bespeaks a lack of respect for the law and thus of good moral character. We conclude that the offense to which the brothers pled guilty is reasonably related to the qualifications of a motor vehicle dealer.

*Essential element of which is fraud,
dishonesty or an act of violence*

In order to find cause for denial under this statute, we must determine that dishonesty, fraud, or violence is an essential element of 26 U.S.C. § 7201. Tax evasion normally does not involve physical violence, but it frequently involves fraud and dishonesty. However:

Dishonesty or fraud must be an *essential element* of the crime. In other words, the question is not whether this particular respondent

was in fact guilty of a dishonest or fraudulent intent; rather, the question is whether the offense with which he was charged and to which he pleaded guilty is one necessitating proof of fraud or dishonesty—that is, *always* requiring that fraud or dishonesty be present as an element of the offense.

State ex rel. Atkins v. Missouri Bd. of Accountancy, 351 S.W.2d 483, 485 (Mo. App., K.C.D.

1961). In *Atkins*, the court addressed the very statute at issue in this case – 26 U.S.C. § 7201 – and found that it does not necessarily involve either fraud or dishonesty. *Id.* at 488, 489, respectively.

We are bound by that determination.

Offense involving moral turpitude

The willful failure to pay income taxes where there is the capacity to pay is a crime of moral turpitude. *In re Duncan*, 844 S.W.2d 443, 444 (Mo. banc 1992). The brothers evaded the duty to pay income tax by underreporting their income. They had the capacity to pay the taxes they owed. There is cause to deny Parks’ application because the crime to which its principals pled guilty involves moral turpitude.

B. Regulation 12 CSR 10-23.160 – Good Moral Character

The Director also alleges there is cause to deny Parks’ application under 12 CSR 10-23.160 because its owners lacked good moral character. That regulation states:

(1) Except with a showing of evidence to the contrary, the following will be considered *prima facie* evidence on which the registration of a motor vehicle dealer, manufacturer, boat dealer, salvage dealer or title service agent will be denied because of lack of good moral character if the applicant:

(A) Has ever been convicted in any federal or state court of a felony relating to the acquisition or transfer of motor vehicles, trailers, motor vehicle parts or boats;

(B) Within five (5) years preceding the application, has been convicted in any federal or state court of a felony, within the last three (3) years, or has been convicted in any federal or state court of a misdemeanor relating to the acquisition of or transfer of motor vehicles, trailers, motor vehicle parts or boats; and

(C) Within three (3) years preceding the application, has been convicted in any federal or state court of a misdemeanor, or has shown contempt of laws in civil or administrative proceedings; or has had a motor vehicle dealer registration, manufacturer registration, boat dealer registration, salvage dealer registration or title service agent registration revoked in this or another state and has demonstrated through conduct since the date of the occurrence that no substantial improvement in character or reliability has occurred. A determination by the director of revenue that conduct subsequent to the occurrence in question demonstrated a failure to improve character or reliability will be made only following a notice to the applicant and a subsequent hearing before the director of revenue or his/her representative. [⁵]

Section 301.559.3 requires motor vehicle dealers to be of good moral character. Under the regulation, a felony conviction within five years preceding an application is *prima facie* evidence of lack of good moral character.⁶

Parks argues, however, that under § 314.200, RSMo 2000, we must consider other factors in order to determine good moral character. That statute provides:

No board or other agency created pursuant to laws of the state of Missouri, or by any city, county or other political subdivision of the state, for the purpose of licensing applicants for occupations and professions may deny a license to an applicant primarily upon

⁵ 12 CSR 10-23.160 (2) provides:

Any dealer or applicant who receives notice of denial or revocation and desires to contest the *prima facie* of the fact(s) recited in subsection (1)(A) or (B) may request a hearing for the purpose of showing substantial rehabilitation or improvement in character sufficient to rebut the presumption created by the cited subsections. Request for a hearing should be submitted to the Director, Motor Vehicle and Driver's Licensing Division, P.O. Box 629, Jefferson City, MO 65105.

This regulation, which provides for an appeal on this issue to the Director, raises additional questions as to our authority in this case. However, in *St. Louis Metropolitan Towing v. Director of Revenue*, 2014 WL 42887673 (Mo. App. W.D., 2014) (slip op.), a case involving the same parties, the court noted that there was no evidence the petitioner had requested such a hearing with the Director, but the Director nonetheless issued a final decision denying the petitioners' application because its owners lacked good moral character. As noted earlier, for purposes of this decision, we consider that the Director, through his failure to act on Parks' application, denied it. Likewise, we consider that the Director, through his answer in this case, made a final decision as to the issue of good moral character.

⁶ The language in the regulation is somewhat confusing because of an apparently misplaced "or." But even if we consider that the felony must be related to the acquisition of or transfer of motor vehicles, we would still conclude the conviction falls within the regulation's description of *prima facie* evidence of lack of good moral character. The Bialczac brothers skimmed large amounts of cash from their businesses, one of which involved the sale of motor vehicles, and failed to pay taxes on those amounts, and pled guilty to felonies in connection with this conduct.

the basis that a felony or misdemeanor conviction of the applicant precludes the applicant from demonstrating good moral character, where the conviction resulted in the applicant's incarceration and the applicant has been released by pardon, parole or otherwise from such incarceration, or resulted in the applicant being placed on probation and there is no evidence the applicant has violated the conditions of his probation. **The board or other agency may consider the conviction as some evidence of an absence of good moral character, but shall also consider the nature of the crime committed in relation to the license which the applicant seeks, the date of the conviction, the conduct of the applicant since the date of the conviction and other evidence as to the applicant's character.**

(Emphasis added). We agree that we must consider those factors. Case law, too, tells us to make our findings of good moral character and rehabilitation based on the record in front of us as of the time of the hearing, not when the events underlying the felony convictions occurred. As the court stated in *Missouri Real Estate Appraisers Comm'n v. Funk*, 306 S.W.3d 101, 105 (Mo. App. W.D., 2010):

[T]he AHC was entitled to conduct a fresh inquiry into whether Funk was deserving of certification, based upon the entire record of relevant admitted evidence pertaining to certification. *Dep't of Soc. Servs., Div. of Med. Servs. v. Senior Citizens Nursing Home Dist. of Ray County*, 224 S.W.3d 1, 15 (Mo.App. W.D.2007) (“The commission actually steps into the department's shoes and becomes the department in remaking the department's decision. This includes the exercise of any discretion that the department would exercise.”) Thus, the inquiry of the AHC was whether, **at the time of the AHC hearing**, Funk met the requirements for general real estate appraisal certification as outlined in sections 339.511.3 and 339.535.

(Emphasis added; footnotes omitted). We follow the direction of the court of appeals and define our task as determining whether, at the time of the hearing, Parks’ principals possessed good moral character. In doing so, we consider the relevant case law and the factors set forth in § 314.200. And, as the courts have also told us, to find good moral character under such

circumstances, we must also find that the brothers have been “rehabilitated.” *See State Bd. of Regis’n for the Healing Arts v. De Vore*, 517 S.W.2d 480, 487 (Mo. App., K.C.D. 1974); *State Bd. of Regis’n for the Healing Arts v. Finch*, 514 S.W.2d 608, 616 (Mo. App., K.C.D. 1974).

Parks presented evidence that the brothers made restitution to the Internal Revenue Service and the Missouri Department of Revenue and that they had no other criminal record. One of their employees, a manager, testified that he believed they had good moral character. Kenneth Bialczac testified that they continued to perform certain community service – towing cars for the St. Vincent DePaul Society – after they had completed the hours required as part of their sentence.

This Commission must assess the credibility of witnesses, and we are free to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D., 2001). William Bialczac did not appear at the hearing; we have had no opportunity to assess his credibility in considering whether he has been rehabilitated or currently possesses good moral character. Kenneth Bialczac’s testimony was adduced from his counsel’s leading questions and was unconvincing. Against this evidence, we balance the fact that the brothers’ criminal conduct was both serious and related to their interrelated businesses.

We conclude that Parks has not met its burden to show that its principals have good moral character. Good moral character is a qualification for licensure, not a discretionary cause for denial. Thus, Parks lacks an essential qualification to obtain a motor vehicle dealer’s license. We have no discretion under such circumstances to grant it a license.

Professional licensing statutes “are remedial statutes enacted in the interest of the public health and welfare and must be construed with a view to suppression of wrongs and mischiefs

undertaken to be remedied.” *Bhuket v. Missouri Bd. of Regis'n for the Healing Arts*, 787 S.W.2d 882, 885 (Mo. App. W.D. 1990). The purpose of professional licensing laws is to protect the public. *Bird v. Missouri Bd. of Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects*, 259 S.W.3d 516, 523 (Mo. banc 2008). At this point, denying Parks’ application will best serve and protect the public. Therefore, we deny its application for a motor vehicle dealer license.

Summary

We deny Parks’ application for a motor vehicle dealer license.

SO ORDERED on September 30, 2014.

\s\ Karen A. Winn

KAREN A. WINN

Commissioner